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No. 99-1212

Supreme Court, U.S.
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In The Supreme Court of the United States

LYNDON H. LAROUCHE, JR., et al.,

Appellants,

v.

DONALD L. FOWLER AS CHAIRMAN, DEMOCRATIC NATIONAL COMMITTEE, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Introduction

In their Motion to Affirm, Appellees admit, as they must, that the Attorney General's Regulations stating which political party electoral activities are subject to preclearance under §5 of the Voting Rights Act are "dispositive" in this case. See Motion p. 2. Those Regulations state that when a political party effects a change affecting voting relating to (a) the party's electoral function, and (b) the party is acting under authority explicitly or implicitly granted by a covered jurisdiction, the change must be precleared. The Regulation states that while changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to

preclearance, *"changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of §5."* 28 C.F.R. § 51.7.

Appellees claim to divine a clear and explicit exemption set forth in the quoted text for Presidential primaries, caucuses, and conventions and for state party organizations acting pursuant to national party edicts. No such exemption exists. Appellees also claim an absolute First Amendment immunity which allows them to discount votes and disqualify candidates without preclearing these changes under §5. Motion, pp. 10, 14-19. This sweeping evisceration of the Attorney General's Regulation, and with it, §5, is plainly wrong and must not be allowed to stand. The public electoral activities of political parties are subject to §5 preclearance precisely because the Democratic Party in the South previously declared its right as a purely private club, to hold completely private elections in order to circumvent the 14th and 15th Amendments and deprive minorities of the *right to an effective vote*. Appellees now propose to engraft the principal legal argument utilized by southern Democrats in the *White Primary Cases* onto the Attorney General's Regulations governing preclearance under the Voting Rights Act.

I. §5 OF THE VOTING RIGHTS ACT CLEARLY APPLIES TO DEMOCRATIC PRESIDENTIAL NOMINATING ACTIVITIES

Morse v. Republican Party of Virginia, 517 U.S. 186, 220 (1996) explicitly rejected Appellees' contention that political parties are not subject to §5 because they are not listed in 42 U.S.C. 1973b(b). In rejecting this crippling interpretation of §5's reach in *Morse*, Justice Stevens noted that the "radicalism" of this interpretation could not be overstated and that under this "extreme" view, even "if a political party flagrantly discriminated in the selection of candidates whose names would appear on the primary election ballot . . . it would not fall within the coverage of §5." Justice Breyer characterized this and similar arguments as "opening a loophole in the statute the size of a mountain," and

cited the history of privatized Democratic Party white primaries, and the legislative history *concerning the election of Mississippi's delegates to the Democratic National Convention* to show that political party nominating activities are clearly subject to preclearance. *Morse* at pp. 235-237.

Lopez v. Monterey County, 119 S.Ct. 693 (1999) just as clearly rejects Appellees' assertion that when a covered jurisdiction is compelled or coerced to change electoral procedures pursuant to an edict by a non-covered jurisdiction, *neither entity* is required to preclear the change under §5. *Lopez* clearly holds that when a covered jurisdiction implements a change in voting procedure under compulsion from a non-covered jurisdiction, that change must be precleared. *Lopez* at p. 701.

Faced with these clear holdings and the plain text of the Attorney General's Regulations, Appellees endeavor mightily to confuse the issue. They claim that this case only involves a white male who former DNC Chairman Donald Fowler has characterized in the basest terms.[1] Appellees also claim this case has limited significance because the disenfranchisements at issue *only* involved two elected delegates to the Democratic National Convention and, in any event, the votes for LaRouche in state-run primaries were counted. Appellees strenuously avoid the fact that while votes may have been counted in the state-run primary

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[1] This claim totally ignores the minority voters who joined with LaRouche to bring this action and the repudiation of Chairman Fowler's calumny against LaRouche by the civil rights veterans, minority office holders, and former Democratic Party office-holders who defended LaRouche within the Democratic Party (J.S. App. 78-79A). The only reason for venting it again appears to be the vain hope that it might find resonance in this Court. A Motion for Leave To File an Amicus Brief has been filed in this case supporting Appellants position by present and former Democratic Party office-holders and civil rights veterans. Appellees' emphasis of the candidate's race also underlines their extremely delimited view of the reach of the Voting Rights Act. Under Appellees' constricted view, it appears that the provisions of the Act are only triggered when minority voters attempt to vote for a minority candidate, not when a white candidate is the candidate of choice.

elections in Louisiana and Texas and in the initial caucus stages in Texas and Virginia, the effectiveness of those votes was rendered nil by the actions of the Appellees in discounting them. In Arizona, Democratic voters who wished to vote for LaRouche were denied any opportunity to do so. The "counted" votes in the actual primary and caucuses were just as empty as the public votes in the old Jaybird primary process in Texas:

> To be sure, the Democratic Primary and the general election are nominally open to the colored elector. But his must be an empty vote cast after the real decisions are made.

Terry v. Adams, 345 U.S. 461, 483-484 (1953).

This court has "consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the 'effectiveness' of a vote cast. . . . Rules concerning candidacy requirements and qualifications, we have held, fall into this category because of their potential to *'undermine the effectiveness of voters who wish to elect [particular] candidates.'*" *Morse* at p. 205, emphasis supplied. This Court has also expressly "rejected the contention that the right to vote depends on the success rate of the candidates one endorses. Voting at the nomination stage is protected regardless of whether it 'invariably, sometimes or never determines the ultimate choice of the representative.'" *Morse* at p. 218, citing *United States v. Classic*, 313 U.S. at 318 (1941).

According to Appellees, the votes cast in the Louisiana Presidential Preference Primary (funded and sponsored by the State and binding as to certain Delegates to the Democratic National Convention), the Texas Primary (funded and sponsored by the state and binding as to certain Delegates to the Democratic State Convention and to the Democratic National Convention) and the votes in the Virginia and Texas caucuses (electing Delegates for party office and to the Democratic National Convention) can be disregarded without preclearance under the Voting Rights Act, when the Chairman of the DNC dictates this result and state

parties, in "purely private party processes" apply DNC-instigated corrective measures nullifying actual votes.[2] (See Motion pp. 6-11). The fallacy of this reasoning is evident. The "white primary" schemes condemned in *Terry v. Adams* and *Smith v. Allright* 321 U.S. 461 (1953) would escape the reach of §5 under this interpretation. No meaningful federal oversight would be possible if parties had only to wait until the "private" state of the process to apply party-approved "correctives" on the actual vote.

As noted in the Jurisdictional Statement, Arizona, Virginia, Texas, and Louisiana each provide the Democratic Party Presidential nominee with a preferred place on their general election ballot.[3] These states also authorize the political parties to choose the method of picking their delegates to the Democratic National Convention.[4] Under *Morse*, the Democratic state parties in covered jurisdictions and the Democratic National Committee, to the extent that it intervenes and controls the decisions of state parties in these jurisdictions, is thus "delegated the power to determine part of the field of candidates from which the voters

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[2] No doubt, the legislators in Texas and Louisiana who designed the Presidential Preference Primary statutes and the voters who participated in these public primaries would be surprised to learn that the Democratic Party has this power. Appellees insist they do, however, under this Court's decisions in *Democratic Party of the United States v. Wisconsin ex rel. Lafollette*, 450 U.S. 107 (1981) and *Cousins v. Wigoda* 419 U.S. 477 (1975). Nothing in *Lafollette* or *Cousins* insulates the changes in voting procedures which result from discounting votes or disqualifying candidates from screening and review under §5 of the Voting Rights Act. The "purely private" "party stage" of the presidential nominating elections is of minimal significance in most states. It is sandwiched between publicly-funded Presidential preference primaries and the publicly-funded Democratic National Convention.

[3] La. Rev. Stat. §§ 18:465, 18:1254, 18:1259, Va. Code §§ 24.2-101, 24.2-542, 24.2-543, Tex. Elec. Code §§52.091, 192.031; Ariz. Rev. Stat. §§16-502, §16-804.

[4] Ariz. Rev. Stat §16-243, La. Rev. Stat 18:1280.27, Va. Code §24.2-508, Tex. Elec. Code §§ 191.001, 191.007

must choose." *Morse* at p. 198. Correspondingly, when any of these states incorporates the party's selection it "endorses, adopts, and enforces the delegate qualifications set by the party for the right to choose that nominee. The major parties have no inherent right to decide who may appear on the ballot. . . .That is a privilege conferred by [state] law, not natural law. To the extent a Party chooses to avail itself of this delegated power in covered jurisdictions, it necessarily becomes subject to §5 of the Voting Rights Act and the Attorney General's Regulations." *Id.*

Appellees distinguish *Morse* because it did not involve delegates to the Democratic National Convention. But as Justice Stevens noted, "the impetus behind the addition of the term 'party office' to §14 was the exclusion of blacks from the Mississippi delegation to the National Democratic Party Convention of 1964." *Morse* at 219, accord, *Id.* at 236-237, (Breyer, J). See also *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala 1972) holding that rules promulgated by the Alabama Democratic and Republican Parties governing election of national delegates required preclearance.[5]

Appellees also accuse Appellants of factual misstatement. In Footnote 4 on page 5 of their Motion, Appellees concede, however, that with the exception of an alleged dispute over Appellants' claims concerning Arizona, *the facts are undisputed* and have been restated by Appellees only for purposes of "clarity" and "emphasis." With respect to Arizona, Appellees claim that the cancellation of the Democratic Party primary had "nothing to do with Rule 11(K) of the Delegate Selection Rules nor Chairman Fowler's letter." Yet, the very Court of Appeals decision which

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[5] Appellees' reliance upon Justice Stevens' discussion of *Williams v. Democratic Party* of Georgia, Civ. No. 16286 (N.D. Ga. Apr. 6, 1972) aff'd, 409 U.S. 809 (1972) is misplaced. (See Motion pp. 16-17). Justice Stevens ultimately rejected reliance on *Williams*, questioning its precedential value, distinguishing its circumstances from both the present Justice Department regulatory regime and the Virginia statutory scheme at issue, and as not supported by the language and structure of the Voting Rights Act and its legislative history. *Morse* at pp. 202-203, 207-219.

Appellees claim as the source for this statement holds that "despite LaRouche's objections, an Arizona state court blocked the state run primary, noting in the process that the DNC had found LaRouche not to be a qualified candidate for the Democratic party nomination." Compare Motion at p. 5 & F.N. 4 and J.S. App. p. 20a. More significantly, the change from a presidential preference primary to a caucus system was required to be precleared under §5, regardless of the reason for the change. *NAACP v. Hampton County Election Comm'n.*, 470 U.S. 166, 180-181 (1985); *Allen v. State Board of Elections*, 393 U.S. 544, 569-570 (1969); Attorney General's Regulations, 28 C.F.R. §51.12.

Appellees use their Counterstatement to present an alternative scenario for the reason why LaRouche's voters and his delegates were disqualified from Virginia's Second Congressional District Caucus, which is different than that set forth in the Complaint. In so doing, they ignore the procedural posture of this case–before the Court on a Rule 12(b)(6) motion to dismiss–in order to contest facts which must be taken as true. Appellees also appear to be presenting issues on venue and jurisdiction which are not properly before the Court. [6]

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[6] Footnote 5 on page 6 of the Motion appears to contest the District Court's jurisdiction over the state parties. The District Court decided that both jurisdiction and venue were appropriate. J.S. App. p. 9a-10a. Appellees did not timely file an appeal or cross-appeal pursuant to Supreme Court Rule 18. Instead, they filed a Motion to Affirm. According to Appellees, LaRouche delegates could have been disqualified in Virginia because LaRouche was not registered to vote under a precleared party rule. It is unclear that this precleared rule, requiring "candidates" to be registered, had any application beyond delegate candidates. Few presidential candidates would be registered to vote in Virginia. More significantly, as set forth in the Complaint, the 2nd Congressional District Caucus was dissolved based on the Fowler letter and hastily passed "temporary" Virginia State Party rules which were not precleared. The first time any other reason was offered for dissolving this caucus was well after this litigation commenced.

II. THE FIRST AMENDMENT DOES NOT IMMUNIZE THE DEMOCRATIC PARTY FROM §5's PRECLEARANCE REQUIREMENTS WHEN IT INSTITUTES CHANGES IN VOTING QUALIFICATIONS AND PROCEDURES IN COVERED JURISDICTIONS

To support their claimed absolute immunity to nullify votes and disqualify candidates, Appellees string cite this Court's lofty language in precedents holding unconstitutional various state legal edicts ordering the seating of delegates at the Democratic National Convention in contravention of party rule (*Cousins* and *Lafollette*), a state law circumscribing party membership when the party sought to expand it (*Tashjean v. Republican Party of Connecticut*, 479 U.S. 208 (1986)) and state efforts to directly regulate internal party affairs (*Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)).

These cases are inapposite. *Allright* and *Terry* demonstrate that when a political party performs a public electoral function, its freedom of association interests do not prevail over the Fifteenth Amendment. Because the "Framers indicated that Congress was to be chiefly responsible for implementing the rights created in" that Amendment, *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), this rule extends to statutes, like the Voting Rights Act, passed under Congress' "remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* This Court has never found a violation of a political party's associational rights in the enforcement of a statute designed to prevent racial discrimination in voting. As Justice Breyer states so forcefully in *Morse*, Congress knew the history of the White Primaries and knew about the use of absolutist First Amendment associational claims as the engines of discrimination when it passed the Voting Rights Act. *Morse* at p. 235.

Appellees claimed First Amendment interest is the right to prevent any delegates pledged to Lyndon LaRouche from even

attending the Democratic National Convention.[7] The District Court sustained this claimed interest against Congress' repeated expressions of the national interest in the Voting Rights Act because it found that while the Voting Rights Act is a statute of "some importance," it must yield before this "core associational right."[8] (J.S. App. p. 14A).

The Attorney General's Regulations already balance political party associational interests against the remedial purposes of the statute. In *Morse*, after discussing the First Amendment balance already inherent in the Attorney General's Regulation, Justice Breyer concludes that First Amendment questions about §5's coverage of political parties "are not so difficult as to warrant interpreting this Act as containing a loophole that Congress could not have intended to create." He cites Justice Marshall's caveat in *Eu* that while the First Amendment guarantees associational freedom, it "does not bar 'intervention . . .necessary to prevent the derogation of the civil rights of the party adherents.'" *Morse* at pp. 238-240.

The District Court decision eviscerates Section 5, exempting the entire Presidential primary and caucus elections

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[7] This actual definition of Democratic Party interest is obscured in the Motion by constant reference to the necessity to protect vague "national party rules" The reason for keeping references to "national party rules" vague in the Motion is also demonstrated by the existence of National Party Rule 4, cited in the Jurisdictional Statement, which commands an "open party" free from discrimination on the ground of "philosophical viewpoint." Rule 4 was, of course, violated by Appellees' actions. J.S. p. 10.

[8] The District Court's absolutist view of the First Amendment is contrary to *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), *cert granted* USLW 3478 (January 21, 2000) (No. 99-401). In that case, the Ninth Circuit made a factual finding that modern parties are governmental in character and lack ideological cohesion, demonstrating great fluidity and overlap of philosophy and membership. It sustained California's new blanket primary rule against the Party's First Amendment claim that the statute was unconstitutional.

from Voting Rights Act coverage. In the District Court's view, nothing in the history of discrimination suggests that a national party would practice discrimination through a state party in a covered jurisdiction. (J.S. App. p. 15a). This statement, alone, demonstrates the District Court's profound misunderstanding of §5. The statute was enacted to screen *new and changed* voting rules in covered jurisdictions precisely because the Courts would no sooner remedy or address one discriminatory scheme, than another would sprout in its place. *South Carolina v. Katzenbach*, 383 U.S. at 335. It covers *all changes in electoral procedures which have a direct relation to or impact on voting*, whether or not these changes have a racially discriminatory purpose or effect. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 506 (1992); *Allen v. State Bd. of Elections*, 393 U.S. at 566, 570.

CONCLUSION

The District Court seriously erred in interpreting §5 of the Voting Rights Act. Its decision should be summarily reversed.

Respectfully submitted,

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